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No. 84-497

In the Supreme Court of the United States

OCTOBER TERM, 1984

LEE M. THOMAS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, APPELLANT

v.

UNION CARBIDE AGRICULTURAL PRODUCTS, CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE APPELLANT

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1. Appellees offer no persuasive answer to our submission that this case is not justiciable. In *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 31 (emphasis added), where the identical attack was made on the statutory scheme, the Court held that "[o]nly after EPA has considered data submitted by Monsanto in evaluating another application *and an arbitrator has made an award* will Monsanto's claims with respect to the constitutionality of the arbitration scheme become ripe." No appellee other than Stauffer has cleared the initial hurdle of presenting a ripe claim. They argue instead that registrations have been granted to other companies based on data previously submitted by appellees, but there is no allegation that any of the appellees (other than Stauffer) has been a party to an arbitration on the compensation due, if any, for these occurrences. *Monsanto* therefore precludes consideration of these appellees' claims.

Stauffer, of course, did receive an arbitration award, but nothing in *Monsanto* suggests that this fact is not only a necessary but also a sufficient precondition to adjudicating constitutional attacks on the arbitration scheme. On the contrary, as this Court has often held, Article III requires a plaintiff to establish an injury in fact *and* to request relief that will redress that injury. See, *e.g., Allen* v. *Wright*, No. 81-757 (July 3, 1984), slip op. 13; *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). Our opening brief (14-18) showed that Stauffer has not satisfied this requirement for the simple reason that it has not requested any relief from the terms of the arbitration award. Appellees have presented no response to this argument.[1] Instead, appellees appear to rely on their claim that the prospective relief they request will relieve them of the " 'clear threat' " of future arbitration (Br. 13). This "threat," however, was not sufficient to make Monsanto's claim ripe, and the claim is

[1]Contrary to appellees' contention (Br. 16), EPA did not concede the correctness of the district court's finding that Stauffer was "aggrieved" by the alleged difference between the amount it sought and the amount awarded by the arbitrators. These findings of fact and conclusions of law were entered by the court on appellees' post-judgment motion under Rules 52(b) and 59(e), Fed. R. Civ. P., to alter or amend the judgment. The government opposed the entry of such findings and conclusions as inappropriate; alternatively, on the premise such action was warranted, the government objected to several conclusions of law as inconsistent with the previously entered judgment. While the government did state that it agreed "that no genuine issue as to any material facts exist in this action and *accordingly* does not contest any of plaintiffs' proposed findings of fact," the government expressly stated that "defendants in no way waive their right to challenge all conclusions of law as well as certain factual findings on their appeal of the judgment of the Court." Memorandum of Law in Opposition to Plaintiffs' Motion to Amend Judgment 2, 3 & nn.*,** (emphasis added).

no more ripe here.[2] So long as no appellee claims that it has engaged in an arbitration that failed to "vindicate its statutory right to obtain compensation" (*Monsanto*, slip op. 31), its legal claim is no more justiciable than that rejected as premature in *Monsanto*.

2. Appellees err in suggesting (Br. 19, 22) that arbitrators will be adjudicating state law trade secret rights. Appellees' claim is that the test data may contain valuable trade secret techniques protected by state law. But, FIFRA's compensation scheme is not for disclosure of data; it arises instead from EPA's consideration of the data in approving a subsequent application for a pesticide registration. The subsequent applicant normally does not see the data but merely cites data referred to in a catalog compiled and published by EPA.[3] Furthermore, if the subsequent applicant is a multinational firm, that company is prohibited by the statute from obtaining the data. 7 U.S.C. 136h(g). Thus, the right that is adjudicated in the arbitration is the federal right to compensation under the federal statute (see *Monsanto*, slip op. 31), not any right to trade secret protection provided by state law.

3. Appellees also argue (Br. 27-31) that their claim of improper delegation of legislative authority, which was not adjudicated below, would support the judgment. The gist of

[2]Nor does the fact that Stauffer went through one arbitration increase the likelihood that that event will occur again. As the Court noted in *Monsanto*, slip op. 31, first EPA would have to consider Stauffer's data in considering another application, and then the parties might still be able to reach an agreement on the amount of compensation, thus avoiding the need for arbitration. Consequently, even with respect to Stauffer, the "threat" of future arbitration is not sufficiently immediate to confer standing. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105-107 (1983); *O'Shea* v. *Littleton*, 414 U.S. 488, 495-496 (1974).

[3]Conversely, a member of the public that obtains disclosure of data pursuant to FIFRA (see *Monsanto*, slip op. 7-8) does not thereby incur any compensation obligation under the statute.

appellees' assertion is that Congress failed to provide standards for measuring the compensation due under the statute. This contention has no merit. The compensation provision was inserted in the statute in 1972, and provided for the right to "reasonable compensation for producing the test data to be relied upon." Pub. L. No. 92-516, § 3(c)(1)(D), 86 Stat. 980. The stated purpose was to spread the costs of data development (S. Rep. 92-838, 92d Cong., 2d Sess. Pt. II, at 69, 72-73 (1972)).[4] The intended measure of compensation was plainly the equitable division of those costs. In 1978, Congress substantially altered the procedural aspects of the arbitration and compensation scheme, assigning the determination of the amount of compensation to the parties and the arbitrators rather than to EPA. It is clear from the legislative history, however, that no change was intended in the expected measure of compensation. See S. Rep. 95-334, 95th Cong., 1st Sess. 7-8, 31 (1977) (compensation is for "the costs of developing data necessary for government approval"); 123 Cong. Rec. 25706 (1977) (emphasis added) (the scheme "protects the data developer's right *to recover his data generation costs*") (remarks of Sen. Leahy).

For these reasons and the reasons stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

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[4]This purpose did not change when Congress amended Section 3(c)(1)(D) in 1975 to cut off compensation rights for data submitted prior to January 1, 1970. See S. Rep. 94-452, 94th Cong., 1st Sess. 10 (1975).